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E-File: March 14, 2014

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[Proposed] Attorneys for the  
Official Committee of Unsecured Creditors  
of Martifer Solar USA, Inc.

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re:

MARTIFER AURORA SOLAR, LLC, a Nevada limited liability company,

- Affects Martifer Aurora Solar, LLC
- Affects Martifer Solar USA, Inc.
- Affects All Debtors

Case No.: BK-S-14-10355-abl  
and BK-S-14-10357-abl

Jointly Administered Under  
Case No. BK-S-14-10355-abl  
Chapter 11

**MOTION OF THE OFFICIAL COMMITTEE  
OF UNSECURED CREDITORS PURSUANT  
TO 11 U.S.C. §§ 1102(b)(3)(A) AND 1103(c)  
FOR ENTRY OF AN ORDER CLARIFYING  
ITS REQUIREMENT TO PROVIDE ACCESS  
TO INFORMATION UNDER 11 U.S.C. §  
1102(b)(3)(A)**

Hearing Date: April 14, 2014  
Time: 9:30 a.m.  
Place: 300 Las Vegas Blvd. So.  
Courtroom 1  
Las Vegas, NV 89101

1 The Official Committee of Unsecured Creditors (the “Committee”) of Martifer Solar USA,  
2 Inc. (“Martifer Solar”, or the “Debtor”), by and through its undersigned counsel, hereby moves (the  
3 “Motion”) this Court, pursuant to Sections 1102(b)(3)(A) and 1103(c) of title 11 of the United  
4 States Code (the “Bankruptcy Code”), for entry of an order (the “Order”), clarifying the  
5 Committee’s requirement to provide access to information for the Debtor’s unsecured creditors  
6 under Section 1102(b)(3)(A) of the Bankruptcy Code. In support of the Motion, the Committee  
7 respectfully represents as follows:

I.

## INTRODUCTION

10 Through this Motion, the Committee requests authority to (a) withhold Confidential  
11 Information and Privileged Information under the “information access” prong of the statute, and (b)  
12 satisfy its duties under the “comment solicitation” prong of the statute by means of a link to a web  
13 page posted on, and accessible via, Committee counsel’s existing internet site. Section  
14 1102(b)(3)(A) raises the issue of whether the Committee could be required to share Confidential  
15 Information or Privileged Information (as such terms are defined below) with any unsecured  
16 creditor. The Committee seeks an order of the Court confirming that Section 1102(b)(3)(A) does not  
17 authorize or require the Committee to provide access to each and every piece of Confidential  
18 Information or Privileged Information to any creditor that the Committee represents.

19 The Committee seeks to satisfy its information sharing obligations in as streamlined and  
20 inexpensive a manner as possible. Thus, the Committee will communicate with its constituency  
21 through the website established by the Firm at [www.pszjlaw.com](http://www.pszjlaw.com) and through periodic newsletters  
22 to the general unsecured creditors, if necessary.

III.

## **FACTUAL BACKGROUND**

25       1. On January 21, 2014 (the “Petition Date”), the Debtors commenced these bankruptcy  
26 cases by each filing a voluntary petition under Chapter 11 of the United States Bankruptcy Code in  
27 the United States Bankruptcy Court, District of Nevada (the “Court”), under the jointly administered  
28 case No. 14-10355-abl (the “Case”).

2. On February 14, 2014, the Office of the United States Trustee appointed the Committee, as augmented from time to time. The members of the Committee are: EPG Solar, LLC; SatCon Technology Corp.; Patriot Solar Group; Solar Optimum, Inc.; and Northern Land Clearing. On February 28, 2014, the Committee selected the Firm as its general bankruptcy counsel.

3. The Debtors are debtors in possession; no trustee or examiner has been appointed.

III.

## JURISDICTION

4. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a), 1102, and 1103 of the Bankruptcy Code. Pursuant to LR 9014.2, the Committee consents to the entry of final orders or judgments on this matter by the bankruptcy judge if it is determines that the bankruptcy judge, absent the consent of the parties, cannot enter final orders or judgment consistent with Article III of the United States Constitution.

IV.

## **RELIEF REQUESTED**

5. The Committee is authorized to, among other things, consult with the Debtor, investigate the Debtor, participate in the formulation of a plan, and perform such other services as are in the interests of those represented. *See* 11 U.S.C. § 1103(c). In addition, as part of the Committee's duties, the Committee is required to provide access to information for the creditors represented by the Committee. *See* 11 U.S.C. § 1102(b)(3)(A).

6. In light of the anticipated discussions regarding the Debtor's prospects for reorganization, the Committee believes that a significant amount of Confidential Information and Privileged Information will be generated. By this Motion, the Committee seeks entry of the Order, *nunc pro tunc* to February 28, 2014, clarifying and implementing an information protocol (the "Information Protocol") regarding the dissemination of information to the Debtor's unsecured creditors, which Information Protocol does not require the Committee to disseminate confidential, proprietary, or non-public information concerning the Debtor or the Committee, or any other

1 information if the effect of such disclosure would constitute a waiver of any privilege or  
2 confidentiality agreement between the Committee and the Debtor. The relief requested herein will  
3 help ensure that confidential, privileged, proprietary, and/or material non-public information  
4 regarding the Debtor or the Committee will not be disseminated to the detriment of the Debtor's  
5 estate or its unsecured creditors and will aid the Committee in performing its statutory functions and  
6 duties.

7 **V.**

8 **THE INFORMATION PROTOCOL**

9 7. For purposes of this Motion, the term "Confidential Information" shall include,  
10 without limitation, all documents, agreements, records, reports, data, forecasts, projections, business  
11 plans, interpretations, audit reports, and all other written, visual, or oral information, regardless of  
12 the method of memorialization or transmission, concerning the Debtor and provided by or on behalf  
13 of the Debtor to the Committee and its members, agents, representatives and professionals and its  
14 members' professionals (together with the Committee, hereinafter collectively referred to as the  
15 ("Committee Entities") in their capacities as such, as well as all notes, memoranda, summaries,  
16 reports, analyses, compilations, forecasts, projections, studies and other materials prepared by either  
17 the Committee Entities or the Debtor containing or based upon, in each case, in whole or in part,  
18 such information, which are not available to the general public (including but not limited to,  
19 financial statements, tax returns, business plans, profit and loss statements, balance sheets,  
20 comparative results of operations, and explanations related thereto). Confidential Material does not  
21 include any information which (a) at the time of disclosure or thereafter is generally available to the  
22 public (other than as a result of disclosure by the Committee Entities), (b) is obtained by the  
23 Committee Entities on a non-confidential basis from a source other than the Debtor or any entities  
24 acting on the Debtor's behalf, when the Committee Entities reasonably believe that such source is  
25 not prohibited from disclosing such information (or any portion thereof) by a contractual, legal, or  
26 fiduciary obligation to the Debtor, (c) is or has been filed by a person (other than the Committee or  
27 Committee Entities) with the United States Bankruptcy Court for the District of Nevada in which the  
28 Case is pending (the "Bankruptcy Court") or any other court or administrative agency whose records

1 are open to public inspection, except such information as has been filed under seal, (d) is already  
2 known to the Committee Entities at the time of disclosure (other than material that is known but  
3 subject to a confidentiality restriction), or (e) is independently developed by the Committee Entities  
4 without reliance upon any of the Confidential Material.

5       8.      The term “Privileged Information” represents information subject to the attorney-  
6 client or some other state, federal, or other jurisdictional doctrine of law privilege, whether such  
7 privilege is solely controlled by the Committee or is a joint privilege with the Debtor or some other  
8 party (collectively, “Privileged Information”).

9       9.      The Committee has received and expects that the Debtor will continue to share  
10 Confidential Information and may, in instances where a joint defense is appropriate, also share  
11 Privileged Information with the Committee in connection with this case. To that end, the Committee  
12 has entered into a confidentiality agreement with the Debtor in order to further the Committee’s  
13 investigation duties. The Committee will also assemble its own Confidential Information and/or  
14 Privileged Information and the Committee’s bylaws also contain provisions to protect the  
15 dissemination of Confidential Information.

16       10.     The Committee will use the Confidential Information and Privileged Information to  
17 assess and analyze, among other things, the Committee’s strategies in the cases, the prospects for a  
18 Debtor’s proposed sale and plan of reorganization, and the alternatives that are available to  
19 maximize returns to unsecured creditors. If there were a risk that the Debtor’s Confidential  
20 Information given to the Committee would have to be turned over to all creditors, the Debtor would  
21 be extremely reluctant to give Confidential Information to the Committee in the first place. The  
22 Debtor might conclude that it could not give such information to the Committee at all. The inability  
23 of the Committee to gain access to Confidential Information, in turn, would limit the ability of the  
24 Committee to fulfill its statutory obligations under the Bankruptcy Code. Hence, maintaining the  
25 confidentiality of Confidential Information and Privileged Information is critical for the Committee  
26 to adequately perform its duties in this case.

27       11.     Public dissemination of Confidential Information could also harm the Debtor’s estate.  
28 Among other things, the Debtor’s Confidential Information, such as employee compensation,

business plan, and asset disposition strategy, is sensitive in nature, and public disclosure of such information would cause serious problems for the Debtor, as well as potentially violate federal and state privacy laws.

12. Thus, the Committee requests authority to withhold Confidential Information and Privileged Information and establish a link to a web page posted on and accessible via, Committee counsel's existing internet site at [www.pszjlaw.com/martifer/html](http://www.pszjlaw.com/martifer/html). The Committee will communicate with its constituency through the website established by the Firm at [www.pszjlaw.com](http://www.pszjlaw.com) and through periodic newsletters to the general unsecured creditors, if necessary.

VI.

**BASIS FOR RELIEF REQUESTED**

13. Section 1102(b)(3) of the Bankruptcy Code provides, in pertinent part, as follows:

A committee appointed under subsection (a) shall —

(A) provide access to information for creditors who —

(i) hold claims of the kind represented by that committee;

and

(ii) are not appointed to the committee;

(B) solicit and receive comments from the creditors described in

subparagraph (A); and

(C) be subject to a court order that compels any additional report or

disclosure to be made to the creditors described in subparagraph (A).

11 U.S.C. § 1102(b)(3).

14. When a statute is clear and unambiguous, “the sole function of the courts is to enforce it according to its terms.” *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). However, in “rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters . . . the intention of the drafters, rather than the strict language, controls.” *Id.* at 242-43 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (internal quotations omitted)).

1       15. The Committee respectfully submits that Section 1102(b)(3)(A) of the Bankruptcy  
2 Code is unclear and ambiguous. The statute simply requires a committee “to provide access to  
3 information,” yet sets forth no guidelines as to the type, kind, and extent of the information to be  
4 provided. In its extreme, section 1102(b)(3)(A) of the Bankruptcy Code could be read as requiring a  
5 statutory committee to provide access to all information provided to it by a debtor, or developed  
6 through exercise of its investigative function, regardless of whether the information is confidential  
7 privileged, proprietary, or material non-public information and regardless of whether disseminating  
8 such information implicates disclosure requirements of the securities laws.

9       16. The legislative history does not provide any further guidance on this point and merely  
10 reiterates the language of Bankruptcy Code section 1102(b)(3). *See H.R. Rep. No. 109-31, 109th*  
11 *Cong., 1st Sess. 87 (2005)* (“Section 405(b) requires the committee to give creditors having claims  
12 of the kind represented by the committee access to information. In addition, the committee must  
13 solicit and receive comments for these creditors and, pursuant to court order, make additional reports  
14 and disclosures available to them.”).

15       17. Indeed, sharing such information without limitations and in the absence of this  
16 Court’s entry of the Order may be detrimental to the Debtor’s business and its ability to maximize  
17 value. Providing unfettered access to such information undoubtedly will allow competitors of the  
18 Debtor to use such information, including any business plan of the Debtor, trade secrets, or other  
19 proprietary information, to that competitor’s advantage and, more importantly, to the disadvantage  
20 of the Debtor and, thus, its unsecured creditors. As such, the relief requested in this Motion is  
21 routinely granted by courts in this district and around the country. *See, e.g., In re Rodeo Creek Gold,*  
22 *Inc.*, Case No. 13-50301 (MKN) (Bankr. D. Nev. May 3, 2013) *In re Nevada Cancer Institute*, Case  
23 No. 11-28676 (MKN) (Bankr. D. Nev. Feb. 7, 2012); *In re USA Commercial Mortgage Co.*, Case  
24 No. 06-10725 (LBR) (Bankr. D. Nev. June 27, 2006); *In re LG Philips Displays USA, Inc.*, Case No.  
25 06-10245 (BLS) (Bankr. D. Del. May 18, 2006); *In re Calpine Corp.*, Case No. 05-60200 (BRL)  
26 (Bankr. S.D.N.Y. February 15, 2006); *In re Refco, Inc.*, 336 B.R. 187, 197-98 (Bankr. S.D.N.Y.  
27 2006); *In re FLYi, Inc.*, Case No. 05-20011 (MFW) (Bankr. D. Del. Nov. 17, 2005).

VII.

## **NOTICE**

18. No trustee or examiner has been appointed in this Chapter 11 case. Notice of this Motion has been given to: (i) the Office of the United States Trustee; (ii) counsel to the Debtors; and (iii) parties requesting special notice.

VIII.

**NO PRIOR REQUEST**

19. No previous request for the relief sought herein has been made to this or any other court.

IX.

## CONCLUSION

**WHEREFORE**, the Committee respectfully requests that the Court enter the Order, annexed hereto as **Exhibit 1**, and grant such other and further relief as the Court deems just and proper.

DATED this 14<sup>th</sup> day of March 2014.



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[Proposed] Attorneys for the Official Committee of Unsecured Creditors of Martifer Solar USA, Inc.

## **EXHIBIT “1”**

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17 [Proposed] Attorneys for the Official Committee  
of Unsecured Creditors of Martifer Solar USA, Inc.  
18

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re:  
21 MARTIFER AURORA SOLAR, LLC, a  
Nevada limited liability company,  
22  Affects Martifer Aurora Solar, LLC  
 Affects Martifer Solar USA, Inc.  
 Affects All Debtors  
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Case No.: BK-S-14-10355-abl  
BK-S-14-10357-abl  
Jointly Administered Under  
Case No. BK-S-14-10355-abl  
Chapter 11

**ORDER GRANTING MOTION OF THE  
OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS PURSUANT TO 11 U.S.C. §§  
1102(b)(3)(A) AND 1103(c) FOR ENTRY OF  
AN ORDER CLARIFYING ITS REQUIREMENT  
TO PROVIDE ACCESS TO INFORMATION  
11 U.S.C. § 1102(b)(3)(A)**

Hearing Date: April 14, 2014  
Time: 9:30 a.m.

1       Upon the *Motion of the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C.*  
2       *§§ 1102(b)(3)(A) and 1103(c) for Entry of an Order Clarifying Its Requirement to Provide Access to*  
3       *Information Under Bankruptcy Code Section 1102(b)(3)(A)* [Docket No. \_\_\_\_] (the “Motion”), filed by  
4       the Official Committee of Unsecured Creditors (the “Committee”) of Martifer Solar USA, Inc., and it  
5       appearing that the relief requested in the Motion is in the best interests of the Debtor’s estate, its  
6       creditors, and all other parties in interest; and the Court having jurisdiction to consider the Motion and  
7       the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion  
8       being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper in this Court pursuant  
9       to 28 U.S.C. §§ 1408 and 1409; and it appearing that no other or further notice need be provided; and  
10      no objections to the Motion having been filed; and after due deliberation and sufficient cause  
11      appearing therefor,

12      **IT IS ORDERED, ADJUDGED AND DECREED** as follows:

13      1.       The relief requested in the Motion is granted.

14      2.       The Committee, its professionals, and its members and their respective agents,  
15       representatives, advisors, and counsel are not be required to disseminate Confidential Information or  
16       Privileged Information to unsecured creditors. The Committee is authorized to withhold Confidential  
17       Information and Privileged Information as such terms are defined in the Motion.

18      3.       The Committee is deemed to have satisfied its duties under the “comment solicitation”  
19       prong of Section 1102(b)(3) of the Bankruptcy Code by means of a link to a web page posted on, and  
20       accessible via, Committee counsel’s existing internet site.

21      4.       This Court shall retain exclusive jurisdiction to interpret and enforce the provisions of  
22       this Order in all respects and further to hear and determine all matters arising from the construction  
23       and implementation of this Order.

24      **IT IS SO ORDERED.**

25      ...

26      ...

27      ...

1 Submitted by:

2 DATED this \_\_\_\_ day of \_\_\_\_\_ 2014

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14  
15 [Proposed] Attorneys for the Official Committee of  
16 Unsecured Creditors of Martifer Solar USA, Inc.

17  
18 **LR 9021 CERTIFICATION**

19 In accordance with LR 9021, counsel submitting this document certifies that the order  
20 accurately reflects the court's ruling and that (check one):

21      The court has waived the requirement of approval under LR 9021(b)(1).  
22      No party appeared at the hearing or filed an objection to the motion.

23      I have delivered a copy of this proposed order to all counsel who appeared at the  
24 hearing, any unrepresented parties who appeared at the hearing, and each has approved or  
25 disapproved the order, or failed to respond, as indicated below:

26      I certify that this is a case under Chapter 7 or 13, that I have served a copy of this  
27 order with the motion pursuant to LR 9014(g), and that no party has objected to the form or content  
of the order.

28 #####